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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

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FRED C. FISHER and CHARLES C. COHN, on behalf of Felix Barcelon,
Plaintiffs in Error,

against

COLONEL DAVID J. BAKER and CAPTAIN JOHN DOE THOMPSON,
Defendants in Error.

No. 214.

SUPPLEMENT TO BRIEF FOR PLAINTIFFS IN ERROR.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Plaintiffs in Error,
71 BROADWAY,
New York.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

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In response to certain questions asked by the learned Justices upon the argument, we desire to supplement our brief as follows:

I.

The Philippine Statute as to Ladronism.

This statute was referred to in the brief of the Solicitor General.

As first enacted (Act No. 518 of Nov. 12, 1902) it reads as follows:

"AN ACT DEFINING HIGHWAY ROBBERY OR BRIGANDAGE, AND PROVIDING FOR THE PUNISHMENT THEREFOR.

"*By authority of the United States, be it enacted by the Philippine Commission, that:*

"SECTION 1. Whenever three or more persons, conspiring together, shall form a band of robbers for the

" purpose of stealing carabao or other personal property
" by means of force and violence, and shall go out upon
" the highway or roam over the country armed with
" deadly weapons for this purpose, they shall be deemed
" highway robbers or brigands, and every person en-
" gaged in the original formation of the band, or joining
" it thereafter, shall, upon conviction thereof, be pun-
" ished by death or imprisonment for not less than
" twenty years, in the discretion of the court.

" SEC. 2. To prove the crime described in the pre-
" vious section, it shall not be necessary to adduce evi-
" dence that any member of the band has in fact com-
" mitted robbery or theft, but it shall be sufficient to
" justify conviction thereunder if, from the circum-
" stances, it can be inferred beyond reasonable doubt
" that the accused was a member of such an armed
" band as that described in said section.

" SEC. 3. Persons guilty of the crime defined in sec-
" tion one may be punished therefor in the Court of
" First Instance in any province in which they may be
" taken or from which they may have fled.

" SEC. 4. Every person knowingly aiding or abetting
" such a band of brigands as that described in section
" one by giving them information of the movement of the
" police or constabulary, or by securing stolen property
" from them, or by procuring supplies of food, clothing,
" arms, or ammunition and furnishing the same to
" them shall, upon conviction be punished by imprison-
" ment for not less than ten years and not more than
" twenty years.

" SEC. 5. The public good requiring the speedy
" enactment of this bill, the passage of the same is
" hereby expedited in accordance with section two of
" ' An Act prescribing the order of procedure by the
" ' Commission in the enactment of laws,' passed Sep-
" tember twenty-sixth, nineteen hundred.

" SEC. 6. This Act shall take effect on its passage."

(Vol. 9 Public Laws and Resolutions of the Philippine Commission, pp. 235–6.)

Certain amendments were made by Act No. 1121 of April 27, 1904, the full text of which is as follows:

" AN ACT AMENDING ACTS NUMBERED FIVE HUNDRED AND EIGHTEEN AND SEVEN HUNDRED AND EIGHTY-ONE SO AS MORE FULLY TO DEFINE THE CRIME OF BRIGANDAGE, AND PROVIDING PUNISHMENT FOR THE FAILURE OF

MUNICIPAL OFFICIALS TO PERFORM THEIR DUTY IN THAT RESPECT.

" *By authority of the United States, be it enacted by the Philippine Commission, that:*

" SECTION 1. Section one of Act Numbered Five " hundred and eighteen, entitled an 'An Act defining " ' highway robbery or brigandage and providing for " ' the punishment therefor,' is hereby amended so as " to read as follows:

" ' SECTION 1. Whenever three or more persons, con- " ' spiring together, shall form a band of robbers for " ' the purpose of stealing carabaos, cattle, horses, rice, " ' or personal property of any description, or for the " ' purpose of abducting persons, either for the " ' purpose of extortion or obtaining ransom, or for " ' any other purpose, by means of force and violence, " ' and shall be armed with deadly weapons for this " ' purpose, they shall be deemed highway robbers, or " ' brigands, and every person engaged in the original " ' formation of the band, or joining it thereafter, shall, " ' upon conviction thereof, be punished by death or " ' imprisonment for not less than twenty years, in the " ' discretion of the court.'

" SEC. 2. Section two of said Act Numbered Five " hundred and eighteen is hereby amended so as to " read as follows:

" ' SEC. 2. To prove the crime described in the pre- " ' vious section, it shall not be necessary to adduce " ' evidence that any member of the band has in fact " ' committed robbery or theft or abduction, but it shall " ' be sufficient to justify conviction thereunder if, from " ' all the evidence, it can be inferred beyond a reason- " ' able doubt that the accused was a member of such " ' an armed band as that described in said section one.'

" SEC. 3. Section four of said Act Numbered Five hun- " dred and eighteen is hereby amended so as to read as " follows:

" ' SEC. 4. Every person knowingly aiding or abet- " ' ting such a band of brigands as that described in " ' section one by giving them information of the move- " ' ment of the police or Constabulary or other peace " ' officers of the Government, or of the forces of the " ' United States Army when acting in aid of the Gov- " ' ernment, or by securing or receiving stolen property " ' from such brigands, or by procuring for them sup- " ' plies of money, food, clothing, arms, ammunition, or

" ' other property of any kind, or by furnishing the
" ' same to them, or by knowingly hiding, lodging, or
" ' harboring in his house or assisting in any way in the
" ' escape of a member of such a band of robbers as de-
" ' fined in section one, shall, upon conviction, be pun-
" ' ished by imprisonment for not less than ten years
" ' and not more than twenty years.'

" SEC. 4. Section five of Act Numbered Seven hun-
" dred and eighty-one, entitled ' An Act amending Act
" ' Numbered One hundred and seventy-five, entitled
" ' " An Act providing for the organization of an Insu-
" ' " lar Constabulary and for the inspection of the
" ' " the municipal police," and Acts Numbered Six
" ' hundred and ten, Six hundred and eighteen and Six
" ' hundred and nineteen amendatory thereof,' is hereby
" amended by adding at the end thereof the following
" words : ' Municipal policemen shall be deemed to be
" ' municipal officers for the purpose of this section.'

" SEC. 5. The public good requiring the speedy en-
" actment of this bill, the passage of the same is hereby
" expedited in accordance with section two of ' An Act
" ' prescribing the order of procedure by the Commis-
" ' sion in the enactment of laws,' passed September
" twenty-sixth, nineteen hundred.

" SEC. 6. This Act shall take effect on its passage."
(Vol. 15, *id.*, p. 99.)

This statutory definition of ladronism or brigandage fully supports our position that ladronism has no political aspect. It is criminal disorder, not insurrection or rebellion ; it threatens individuals, not the governmental framework.

II.

Distinction Between Rebellion and Insurrection.

We beg to quote the definitions of "rebellion" and "insurrection" given in Lieber's Code or "Instructions for the Government of Armies of the United States in the Field," which constitutes the military law of the United States (See Birkheimer, Military Government & Martial Law, p. 485) :

" 1. Insurrection is the rising of people in arms
" against their Government or a portion of it, or against

"one or more of its laws, or against an officer or officers "of the Government. It may be confined to mere "armed resistance, or it may have greater ends in "view." * * *

"3. The term rebellion is applied to an insurrection of large extent, and is usually a war between "the legitimate Government of a country and portions "of provinces of the same who seek to throw off their "allegiance to it and set up a Government of their "own."

These definitions bring out a clear distinction between the two terms, and show that "insurrection" means merely armed resistance to certain features of a government, while "rebellion" is an attempt to overthrow the Government altogether.

If, as we contend, the *habeas corpus* clause of the constitution is applicable to the Philippines as a fundamental limitation upon the powers of Congress, then the inclusion in the Philippine Civil Government Act, of "insurrection" as a ground of suspension of the privilege of the writ, is unconstitutional, and the privilege of the writ may not be suspended in the Philippines except in cases of "rebellion" and "invasion."

It does not appear to be claimed in the case at bar that either "rebellion" or "invasion" existed in the Philippine Islands at the time of the decision below, and the very statute under which Roxas was prosecuted negatives any inference even of insurrection.

III.

Governmental Recognition of Condition of Peace.

It is evident that neither the Government of the United States nor the Government of the Philippine Islands believed that a condition of insurrection existed in Batangas or Cavite during the time of the suspension of the writ. This is made

evident from the following action on the part of the Government.

> " Section 7 of the act of Congress providing for the " taking of the census declares :
>
> " That two years after the completion and publication " of the census, in case of such condition of general and " complete peace with recognition of the authority of the " United States shall have continued in the territory of " said islands not inhabited by Moros or other non- " Christian tribes, and such facts shall have been certi- " fied to the President by the Philippine Commission, the " President upon being satisfied thereof shall direct said " Commission to call, and the Commission shall call, a " general election for the choice of delegates to a popu- " lar assembly of the people of said territory in the " Philippine Islands, which shall be known as the Phil- " ippine assembly. After said assembly shall have con- " vened and organized all legislative power heretofore " conferred on the Philippine Commission in all that " part of said Islands not inhabited by Moros or other " non-Christian tribes shall be vested in a legislature " consisting of two houses, the Philippine assembly.
>
> " The President having been advised by the Secre- " tary of War of the completion and publication of the " census, cabled to the Governor-General of the Philip- " pines that upon March 27, 1907, if the conditions " should be as indicated in the foregoing law, he will " direct the Commission to call a general election. This " information was published in Manila by the Gov- " ernor-General's proclamation of March 28, 1905."
>
> (Report of the Phil. Com., Part 1, 1905, p. 26).

It will be noted that the calling by the Commission of a general election depends upon a *continued* " general and complete peace with recognition of the authority of the United States " for a period of two years " after the completion and publication of the census." Manifestly the publication of the census indicated the existence of peace at the time of publication, since it was the publication which was to set the two year *peace time* running. It is, therefore, interesting to find the following proclamation of the Governor on the 28th day of March, 1905 :

"BY THE GOVERNOR-GENERAL OF THE PHILIPPINE ISLANDS.
"A PROCLAMATION.

"Whereas the Secretary of War has informed this "Government that on the twenty-seventh day of March, "nineteen hundred and five, the Philippine Census "Bureau, with the aid of the United States Census "Bureau, completed and published the fourth and last "volume of the report of the Philippine census taken "in accordance with the provisions of section six of the "Act of Congress approved July first, nineteen hun-"dred and two:

"Now, therefore, I, LUKE E. WRIGHT, Governor-"General of the Philippine Islands, do hereby proclaim "the publication of the Philippine census as above set "forth, and do call the attention of the people of these "Islands to that part of section seven of the said Act of "Congress approved July first, nineteen hundred and "two, which provides that two years after the completion "and publication of the census, in case a condition of "general and complete peace with recognition of the "authority of the United States shall have continued in "the territory of these Islands not inhabited by Moros "or other non-Christian tribes and such facts shall "have been certified to the President by the Philippine "Commission, the President upon being satisfied "thereof shall direct the Philippine Commission to call, "and the Commission shall call, a general election "for the choice of delegates to a popular assembly of "the people of said territory in the Philippine Islands, "which shall be known as the Philippine Assembly, and "which provides also that after the said Assembly shall "have convened and organized, all the legislative power "heretofore conferred on the Philippine Commission in "all that part of these Islands not inhabited by Moros "or other non-Christian tribes shall be vested in a Leg-"islature consisting of two Houses—the Philippine "Commission and the Philippine Assembly.

"In witness whereof I have hereunto set my hand "and caused the seal of the Government of the Philip-"pine Islands to be affixed.

"Done at the City of Manila this twenty-eighth day "of March nineteen hundred and five.

"LUKE E. WRIGHT.

"By the Governor-General:

"A. W. FERGUSSON,
"Executive Secretary."

(Rep. of the Phil. Com., Part I, 1905, pp. 801, 802).

Neither the Secretary of War nor the Governor-General of the Philippine Islands could have issued such a proclamation during the existence of insurrection, the very issuance of such proclamation being predicated upon the existence of a state of peace which, should it continue for a period of two years, would lead to the general elections provided for by the statute.

IV.

Additional historical instance of suspension.

In our brief, we stated (at page 9): "The privilege of the writ has never been suspended by the Federal Government in this country except during the Civil War." A similar statement is found in the Solicitor General's brief at page 35. Another instance of such suspension has just come to our notice, and we deem it our duty to call it to the attention of the Court in correction of such statement in our brief.

We refer to the Act of April 20th, 1871 (17 U. S. Statutes, p. 13), characterized by Professor Burgess as "the noted, not to say notorious, Ku Klux Act" (see "Reconstruction and the Constitution," pp. 257-261).

This Act, after defining certain unlawful combinations "to overthrow, or to put down or to destroy by force the government of the United States," or to prevent the execution of the laws of the United States, etc., provided as follows:

> "SEC. 4. That whenever in any State or part of a "State the unlawful combinations named in the preced- "ing section of this act shall be organized and armed, "and so numerous and powerful as to be able, by vio- "lence, to either overthrow or set at defiance the con- "stituted authorities of such State, and of the United "States within such State, or when the constituted "authorities are in complicity with, or shall connive at "the unlawful purposes of, such powerful and armed

" combinations; and whenever, by reason of either or
" all of the causes aforesaid, the conviction of such
" offenders and the preservation of the public safety
" shall become in such district impracticable, in every
" such case such combinations shall be deemed a rebel-
" lion against the government of the United States, and
" during the continuance of such rebellion, and within
" the limits of the district which shall be so under the
" sway thereof, such limits to be prescribed by procla-
" mation, it shall be lawful for the President of the
" United States, when in his judgment the public safety
" shall require it, to suspend the privileges of the writ
" of *habeas corpus*, to the end that such rebellion may
" be overthrown: *Provided*, That all the provisions of
" the second section of an act entitled 'An act relating
" 'to *habeas corpus*, and regulating judicial proceedings
" 'in certain cases,' approved March third, eighteen
" hundred and sixty-three, which relate to the discharge
" of prisoners other than prisoners of war, and to the
" penalty for refusing to obey the order of the court,
" shall be in full force so far as the same are applicable
" to the provisions of this section: *Provided further*,
" That the President shall first have made proclamation,
" as now provided by law, commanding such insurgents
" to disperse: *And provided also*, That the provisions
" of this section shall not be in force after the end of
" the next regular session of Congress."

It would appear that under this statute the privilege of the writ was in fact suspended for a short time in certain counties in South Carolina (Burgess, *supra*, pp. 260, 261). We are unable to find any reported decisions affecting the construction or constitutionality of this act save U. S. vs. Harris, 106 U. S., 629, holding invalid a combination clause in the Revised Statutes taken from this law. It is to be noted, however, that it reapplied the provisions of the Act of March 3, 1863 (12 U. S. Stat., 755), in regard to the discharge of prisoners not indicted by the next Grand Jury, and that it expired by its own terms by the end of the next regular session of Congress.

So far as this Act of 1871 has any bearing on the questions at bar, we regard it as supporting our contention that the privilege of the writ of *habeas corpus* cannot be suspended except by specific authorization of Congress during rebellion or invasion, and that under the Constitution Congress can

make no general delegation of the power of suspension. It is also in accord with our views that "rebellion" must, *ex vi termini*, have a political purpose, and is not constituted by mere common-law crime.

October 16, 1906.

Respectfully submitted,

FREDERIC R. COUDERT,

HOWARD, THAYER & KINGSBURY,

Counsel for Plaintiffs-in-Error,

71 Broadway, N. Y.